

No. 15413

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY CO., a Corporation,
Appellant,

VS.

JANE S. LYONS,
Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 34)

Appeal from the United States District Court for the
District of Oregon

FILED

MAR 21 1957

PAUL P. O'BRIEN, CLERK

No. 15413

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY CO., a Corporation,
Appellant,

vs.

JANE S. LYONS,

Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 34)

Appeal from the United States District Court for the
District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	5
Attorneys, Names and Addresses of	1
Certificate of Clerk	31
Complaint	3
Findings of Fact and Conclusions of Law	21
Findings of Fact, Supplemental	24
Judgment Order	25
Memorandum Opinion	17
Motion for Consolidation	33
Affidavit of Kriesien, R. E.	34
Order	34
Notice of Appeal	26
Pretrial Order	8
Statement of Points on Appeal	29
Undertaking for Costs on Appeal and Super- sedeas Bond	27

Transcript of Proceedings	39
---------------------------------	----

Witnesses, Defendant's:

Disposition of:

Rush, Homer P., M.D.

—direct	649
—cross	709
—redirect	742

Testimony of:

Hunter, Dr. Warren C.

—direct	509
—cross	522

Waston, Dr. Charles Edward

—direct	547
—cross	557
—redirect	570

Wilson, Dr. Charles R.

—direct	571, 584
—cross	590
—redirect	615
—recross	617

Witnesses, Plaintiff's:

Testimony of:

Chamberlain, Dr. Francis

—direct	93, 142, 211, 233
—cross	260, 271
—redirect	312

Witnesses, Plaintiff's—(Continued):

Testimony of—(Continued):

Christen, Dr. Jose J.

—direct 98

—cross 109

—redirect 111, 506

Hawk, Walter C.

—direct 65

—cross 77

Lehman, Dr. William Lewis

—direct 114, 129, 633

Lyons, Jane S.

—direct 87, 132, 641

—cross 139, 644

Maguire, Robert F.

—direct 52, 501

—cross 62, 505

McKeown, Dr. Raymond M.

—direct 194

—cross 201

—redirect 204

—recross 206

Neal, Leonard LeRoy

—direct 80

—cross 84

Witnesses, Plaintiff's—(Continued):

Testimony of—(Continued):

Raaf, Dr. John

—direct 622

—cross 626

Rush, Dr. Homer P.

—direct168, 210, 319, 629

—cross405, 468

—redirect 492

NAMES AND ADDRESSES OF ATTORNEYS

MEINDL, MIZE & KRIESIEN;
R. E. KRIESIEN,
1431 American Bank Building,
Portland 5, Oregon,
For Appellant.

MAGUIRE, SHIELDS, MORRISON & BAILEY;
ROBERT F. MAGUIRE,
HOWARD K. BEEBE,
723 Pittock Block,
Portland 5, Oregon,
For Appellee.



The United States District Court
for the District of Oregon

Civil No. 7381

JANE S. LYONS,

Plaintiff,

vs.

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for her
cause of action against it alleges:

I.

At all times mentioned herein plaintiff was and
now is a citizen, resident and inhabitant of the
State of Oregon.

II.

At all times mentioned herein defendant was and
now is a corporation duly organized and existing
under and by virtue of the laws of the State of
New York and was and is transacting an insurance
business in the State of Oregon.

III.

The amount in controversy herein exceeds the
sum of \$3,000.00, exclusive of interest and costs.

IV.

Prior to February 10, 1953, defendant in consid-
eration of a good and sufficient monetary premium

which was paid by James Alexander Lyons issued to said James Alexander Lyons a policy of insurance under the terms of which defendant promised and agreed that in case said James Alexander Lyons sustained bodily injury by accidental means resulting directly and independently of all other causes in death, it would pay to plaintiff the sum of \$5,000.00.

V.

Said policy was in full force and effect at all times mentioned herein.

VI.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby directly resulted from and was caused by accidental means.

VII.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$5,000.00, but defendant has denied all liability under said policy and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of six per cent per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VIII.

The sum of \$5,000.00 is a reasonable sum to be

allowed plaintiff as attorneys' fees in the prosecution of this claim.

Wherefore, plaintiff demands judgment against defendant in the sum of \$5,000.00, together with interest thereon at 6% per annum from February 10, 1953, and for the further sum of \$5,000.00, as and for reasonable attorneys' fees and her costs and disbursements herein incurred.

/s/ ROBERT F. MAGUIRE,

/s/ HOWARD K. BEEBE,
Attorneys for Plaintiff.

[Endorsed]: Filed February 9, 1954.

[Title of District Court and Cause.]

Civil No. 7381

ANSWER

Comes now defendant and for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits paragraphs I, II and III of plaintiff's complaint.

II.

Denies each and every other allegation of plaintiff's complaint and the whole thereof, generally

and specifically, except as may be hereinafter admitted.

Second Defense

I.

Defendant alleges that prior to and on or about the 10th day of February, 1953, there was in full force and effect a standard accident policy in the principal sum of \$5,000.00 wherein James Alexander Lyons was the named assured and Jane S. Lyons the designated beneficiary.

II.

That under and by virtue of the terms and provisions of said policy, hereinbefore described, the principal sum became payable in the event the assured, James Alexander Lyons, sustained bodily injury caused by accidental means, which directly and independently of all other causes occasioned his death, and said policy specifically excluded death caused directly or indirectly, wholly or partly, by disease whether the disease was the primary, proximate or contributing cause.

III.

That under and by virtue of the terms and provisions of said policy, as a condition to the payment of said principal sum, the claim therefor was required to be substantiated by the submission to defendant of a satisfactory proof of death within the policy provisions and without the policy exclusions.

IV.

That plaintiff failed to submit to defendant satisfactory proof:

(a) That the assured sustained bodily injury through accidental means which directly and independently of all other causes occasioned his death, and

(b) That the assured's death was not caused directly or indirectly, wholly or partly, by disease whether the disease was the primary, proximate or contributing cause;

and defendant thereupon rejected plaintiff's claim.

Third Defense

I.

Defendant realleges paragraphs I and II of its second defense.

II.

Defendant alleges that if the assured, James Alexander Lyons, sustained any bodily injury prior to his demise, that:

(a) Said injury did not directly and independently of all other causes occasion his death;

(b) The assured, James Alexander Lyons' death was caused directly or indirectly, wholly or partly, by disease whether said disease was the primary, proximate or a contributing cause.

Wherefore, defendant demands judgment that the

complaint herein be dismissed and that it have its costs and disbursements of this action.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed March 8, 1954.

[Title of District Court and Cause.]

Civil No. 7381

PRETRIAL ORDER

On the 12th day of September, 1955, a pretrial conference in the above-entitled action was held in open court, before the Honorable William G. East, Judge of the above-entitled court; plaintiff was represented by Robert F. Maguire and Howard K. Beebe, of her attorneys, and defendant was represented by R. E. Kriesien and Ray Mize, of its attorneys.

Thereupon the following proceedings were had:

Agreed Statement of Facts

I.

That diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the State of Oregon and defendant is a foreign corporation.

II.

That the amount in controversy herein exceeds \$3,000.00, exclusive of interest and costs.

III.

That prior to the 10th day of February, 1953, Glens Falls Indemnity Co., a New York corporation, issued in the State of Oregon accident policy number 22148, in the principal sum of \$5,000.00, wherein James Alexander Lyons was the named assured and the plaintiff, Jane Lyons, the designated beneficiary, said policy being in full force and effect on the 10th day of February, 1953, said policy having been issued on December 9, 1935.

IV.

That under and by virtue of the terms and provisions of said policy, Plaintiff's Exhibit 1, the principal sum became payable to the plaintiff in the event the assured, James Alexander Lyons:

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the policy shall not cover death caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

V.

That on or about the 10th day of February, 1953, the assured, James Alexander Lyons, died in the

country called Los Llanos, Southern Territory of Lower California, Mexico.

VI.

That thereafter an inquest was held and an autopsy performed inquiring into the cause of the death of the assured, James Alexander Lyons, certified copy of which in Spanish is Exhibit 5 and the English translation thereof is Exhibit 5A, and the other certified copies in the Spanish is Exhibit 27 and the English translation thereof is Exhibit 27A; said exhibit numbers being, in the companion case, civil number 7256.

VII.

That there was duly recorded in the Book of Deaths for the year 1953, number One of the Civil Registry in the Port of San Jose del Cabo, Southern Territory of Lower California, Mexico, at pages 3, 4 and 5, as Act number 5, death certificate which certified that the cause of death of James Alexander Lyons was:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart, having found moreover atheromatous deposits of the coronary arteries.”

A certified copy of the original in Spanish is Exhibit 4 and the English translation thereof is Exhibit 4A; said exhibit numbers being, in the companion case, civil number 7256.

VIII.

That plaintiff filed proof of death of James Alexander Lyons with defendant. Plaintiff's Exhibit 8.

IX.

That defendant rejected plaintiff's claim and more than six months elapsed thereafter before plaintiff instituted this action.

Plaintiff's Contentions

1. That James Alexander Lyons' death resulted directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

2. Said death was not caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

3. Plaintiff is entitled to recover from the defendant the sum of the face amount of said policy, together with interest thereon at 6% per annum from February 10, 1953, until paid, and, in addition, the sum of \$5,000.00 as and for a reasonable attorneys' fee herein.

Defendant's Contentions

1. That on or about the 20th day of May, 1950, the assured, James Alexander Lyons, suffered an attack of coronary insufficiency.

2. That on the 3rd, 4th and 5th days of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease which resulted in an

attack of coronary insufficiency to the extent that nitroglycerin was prescribed and the assured, James Alexander Lyons, was advised to refrain from doing any strenuous exercise such as lifting or tramping through the fields.

3. That on the 10th day of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease.

4. That the assured, James Alexander Lyons, died as a result of a fatal heart attack due to the diseased condition of his heart and not as a result of an accidental injury and therefore is not entitled to recover under the terms and provisions of the policy of insurance involved herein.

5. That it is more, or as equally, probable the shotgun was discharged as a result of the assured, James Alexander Lyons, suffering a fatal heart attack as it is that the shotgun was accidentally discharged prior to the fatal heart attack.

6. That the proof of death submitted by plaintiff to defendant constituted an admission that a pre-existing heart disease caused or contributed with the injury, if any, in resulting in the death of the assured, James Alexander Lyons, and under the law as enunciated by the Supreme Court of the State of Oregon, such accident, if any, cannot be considered as the sole cause or the cause independent of all other causes of death.

7. That if it is established by competent, satisfactory evidence the shotgun was accidentally

discharged prior to the fatal heart attack, the superficial injuries sustained by the assured, James Alexander Lyons, and the resulting emotional shock, if any, would not have caused an aortic insufficiency or a coronary insufficiency without the existence of the pre-existing heart disease and that it was necessary for the pre-existing heart disease to co-operate with the injury, if any, to result in the death of the assured and under such set of facts under the law of the State of Oregon, such death was not an accidental death within the policy coverage.

8. That plaintiff failed to submit satisfactory proof the assured, James Alexander Lyons, accidentally discharged a shotgun prior to suffering a fatal heart attack.

9. That plaintiff failed to submit satisfactory proof that the assured, James Alexander Lyons,

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the death was not caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

10. That in the event plaintiff should prevail, plaintiff is not entitled to attorney's fees.

Issues of Fact

1. Is there any competent, satisfactory evidence that a shotgun was accidentally discharged which

inflicted bodily injuries prior to the assured, James Alexander Lyons, suffering a fatal heart attack?

2. Did any bodily injuries sustained by the assured, James Alexander Lyons, solely and independently of all other causes result in his death?

3. Did the assured, James Alexander Lyons, have a pre-existing heart disease?

4. Was the death of the assured, James Alexander Lyons, caused or contributed to by a pre-existing heart disease?

5. Was a diseased heart condition of the assured, James Alexander Lyons, the sole cause of his death?

6. In the event plaintiff is entitled to recover, was the proof of death filed with defendant sufficient proof of accidental death under the policy so as to entitle plaintiff to recover attorneys' fees as a result of defendant's denial of such claim and, if so, what sum would be a reasonable sum to allow plaintiff as attorneys' fees herein?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are below enumerated and identified, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. The parties admit the authenticity of the following exhibits, but reserve the right to object to their introduction into evidence on the grounds of irrelevancy, immateriality and incompetency.

It is stipulated between the parties that the exhibits in the companion case, Civil No. 7256, are referred to and are considered as exhibits herein, insofar as they may be applicable.

Plaintiff's Exhibits

1. Policy No. 22148.
2. Telegram Maguire, et al., to Glens Falls, February 16, 1953.
3. Letter Glens Falls to Maguire, et al., May 7, 1953.
4. Letter Maguire, et al., to Glens Falls July 28, 1953.
5. Letter Maguire, et al., to Glens Falls August 20, 1953.
6. Letter Glens Falls to Maguire, et al., August 24, 1953.
7. Letter Maguire, et al., to Glens Falls September 15, 1953.
8. Proof of loss.

Defendant's Exhibits

- 9.
- 10.
- 11.
- 12.

The parties and each of them reserve the right to adopt any or all of the above pretrial exhibits.

The foregoing is certified to be a record of the proceedings had at the pretrial hearing in this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact;

It Is Further Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the court to prevent manifest injustices.

Done and dated in open court this 28th day of November, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

/s/ HOWARD K. BEEBE,
Of Attorneys for Plaintiff.

/s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

[Endorsed]: Filed November 28, 1955.

[Title of District Court and Cause.]

Civil No. 7256

MEMORANDUM OPINION

These are two actions by the beneficiary of two accident policies issued to James A. Lyons. The insured died on February 10, 1953, near Los Llanos, Lower California, Republic of Mexico, while on a hunting trip with a small party, including two well-qualified cardiologists, Drs. Rush and Chamberlain. The issue for resolution is whether or not the insured died by reason of bodily injury caused by accidental, violent, external and visible means, and whether that injury solely and independently of any other cause within three calendar months from the date of the accident occasioned the death. As a corollary to this issue, or as a further condition, plaintiff had the burden of proving that the assured's death was not directly or indirectly caused or contributed to, within the meaning of the contract, by disease or natural causes.

The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced by a preponderance of the evi-

dence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was "normal" and "healthy" and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court.

The wealth of evidence in this case is too great to permit of extended discussion. It may be noted briefly, however, that the autopsy report upon which defendants place reliance does not note the vital fact of the degree of diminishment of the aortic

lumen; that a diminishment in small part of the lumen, although noticeable, and properly noted by an autopsy surgeon, is nevertheless consistent with a properly functioning aorta; that in the absence of a detailed finding of the degree of diminishment of the lumen, the effect of such diminishment is left to speculation and surmise; that many men of the age group of the assured have some degree of diminishment of the aortic lumen without being diseased within the meaning of the policies; that the presence of atheromatous plaques on the aortic valves likewise is an insufficient notation upon which to found a conclusion of incompetence of the valves without some greater description of the degree of stiffness, warpedness, shrinkage, or other malfunction of the valves; that the autopsy report leaves the degree, if any, of malfunctioning of the valves a matter of speculation, for lack of a sufficient description of the degree, character, and effect of the atheromatous plaques discovered on the assured's aortic valves. Likewise, it may be noted briefly that defendant's expert witnesses did not have the same opportunity to observe the assured at close range and for a period of more than a day while he was engaged in strenuous activity and exertion, as did plaintiff's expert witnesses. The conclusions of defendant's expert witnesses that heart failure came on suddenly on February 10th are inconsistent with the conclusions of plaintiff's expert witnesses who had observed the deceased during periods of peak exertion and strain, greater

than any undergone by the deceased immediately before his death, and who had not detected any signs in the deceased's appearance which would have alerted their trained senses. Defendant's experts' other hypothesis of death, that the heart failure was brought on by a sudden sharp pain caused by a passing of a gallstone through the cystic duct, is made too remote and speculative a possibility and too unlikely a sequence of facts by the overwhelming weight of the other expert testimony in this case.

These brief observations are made not to represent the complete or exclusive basis upon which the court has made its findings, but only to answer some of the main contentions made by the defendant, out of deference to the extreme skill with which they, as well as counsel for plaintiff, have presented their case. All counsel associated with these cases are to be commended upon the manner in which they prepared and presented them. Let the prevailing party prepare findings of fact and conclusions of law in accordance with the Rule, if it is so desired.

Dated: October 12th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed October 16, 1956.

[Title of District Court and Cause.]

Civil No. 7381

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial before the undersigned judge of the above-entitled Court, the Court having heard the opening statements of counsel, the evidence adduced by both parties and having considered the same, together with all exhibits received in evidence herein and the briefs of counsel, and being of the opinion that the plaintiff has sustained her burden of proof on all matters involved herein, the Court does hereby make the following:

Findings of Fact

I.

Diversity of citizenship exists between the parties hereto in that plaintiff is a citizen and resident of the State of Oregon and defendant is a New York corporation.

II.

The amount in controversy herein exceeds \$3000, exclusive of interest and costs.

III.

Prior to the 10th day of February, 1953, defendant issued in the State of Oregon its accident insurance policy No. 22148 in the principal sum of \$5000.

wherein James Alexander Lyons was the named insured and the plaintiff herein, Jane S. Lyons, was the designated beneficiary. Said policy was in full force and effect on the 10th day of February, 1953.

IV.

Under and by virtue of the terms and provisions of said policy, the principal sum thereunder became payable to the plaintiff in the event the insured, James Alexander Lyons:

(a) Suffered death resulting directly and independently of all other causes from bodily injury sustained and effected solely through accidental means; and

(b) Provided that such death was not caused directly or indirectly, wholly or partly by bodily or mental infirmity or by disease.

V.

On or about the 10th day of February, 1953, the said James Alexander Lyons died from bodily injuries which resulted directly and independently of all other causes and which were effected solely through accidental means; namely, the accidental discharge of his shotgun.

VI.

Said James Alexander Lyons was a vigorous, robust man of normal health for his age, and was not suffering from bodily or mental infirmity or from disease; and his said death was not caused

directly or indirectly or wholly or partly by bodily or mental infirmity or by disease.

VII.

On or about the 5th day of September, 1953, plaintiff submitted due proof of such death of said Alexander Lyons to defendant and more than six months has elapsed since said submission of such proof of death and defendant has failed and neglected to pay said principal sum, or any part thereof, to plaintiff.

And, based upon said findings, the Court does hereby make the following:

Conclusions of Law

I.

Plaintiff is entitled to recover of and from the defendant the sum of \$5000, together with interest thereon at the rate of 6% per annum from September 5, 1953, until paid.

II.

Under Oregon law plaintiff is entitled to recover of and from the defendant a reasonable attorney's fee to be later found and established by the Court and the Court does hereby reserve jurisdiction for the purpose of finding, fixing and awarding such attorney's fee.

III.

Plaintiff is entitled to recover her necessary costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7381

SUPPLEMENTAL FINDINGS OF FACT

It having been stipulated by the parties hereto that the issue of the amount to be allowed to plaintiff on account of a reasonable attorney's fee herein be submitted to the court for determination upon the record, the court does hereby make the following

Supplemental Findings of Fact

I.

The sum of \$1000.00 is a reasonable sum to be allowed plaintiff on account of attorney's fees herein.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

The United States District Court
for the District of Oregon

Civil No. 7381

JANE S. LYONS,

Plaintiff,

vs.

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial without a jury before the Honorable Edward P. Murphy, Judge of the above-entitled Court, commencing on November 22, 1955, and concluding December 8, 1955. Plaintiff appeared in person and by Robert F. Maguire and Howard K. Beebe of her attorneys, and defendant appeared by Ray Mize and R. E. Kriesien, its attorneys. The respective parties introduced evidence upon the issues raised by the Pretrial Order and their counsel argued the law and the facts by briefs. The Court having considered the evidence, arguments and briefs, and having made its Findings of Fact and Conclusions of Law, now, therefore,

It Hereby Is Considered, Ordered and Adjudged that plaintiff recover of and from the defendant the sum of \$5000, together with interest thereon at the rate of 6% per annum from the 5th day of September, 1953, until paid, together with the further

sum of \$1000.00 as and for a reasonable attorney's fee herein, and her costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7381

NOTICE OF APPEAL

Notice is hereby given that Glens Falls Indemnity Co., a New York corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1956.

Dated this 10th day of December, 1956.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7381

UNDERTAKING FOR COSTS ON APPEAL
AND SUPERSEDEAS BOND

Whereas, Glens Falls Indemnity Co., a corporation, defendant in the above cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in favor of the above plaintiff and against said defendant in the above court on or about the 13th day of November, 1956, which said judgment was and is for the sum of Five Thousand and no/100 Dollars (\$5,000.00), together with interest thereon at the rate of Six per cent (6%) per annum from the 5th day of September, 1953, until paid, together with the further sum of One Thousand and no/100 Dollars (\$1,000.00) as and for a reasonable attorney's fee herein, and her costs and disbursements;

Now, Therefore, in consideration of the premises and of such appeal, we, Glens Falls Indemnity Co., a corporation, as Principal, and St. Paul Fire and Marine Insurance Company, a Minnesota corporation, duly authorized to engage in the business of a surety in the State of Oregon and the State of California, do hereby jointly and severally undertake and promise on the part of said appellant-defendant that said appellant-defendant will pay all damages, costs and disbursements which may be awarded against it on said appeal; and

Whereas, said appellant-defendant desires that execution on said judgment be stayed pending said appeal;

Now, Therefore, we do further in consideration thereof jointly and severally undertake and agree that if said judgment be affirmed, said appellant-defendant will satisfy it insofar as it may be affirmed in not to exceed the sum of Eight Thousand and no/100 Dollars (\$8,000.00).

Dated at Portland, Oregon, this 28th day of November, 1956.

[Seal] GLENS FALLS INDEMNITY
CO.,

By /s/ [Indistinguishable],
Secretary.

[Seal] ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

By /s/ WILLIAM B. JOANSON,
Attorney-in-Fact.

Countersigned:

JEWETT, BARTON, LEAVY
& KERN;

By /s/ JOHN F. DOLON,
Oregon Resident Agent.

Approved this 17th day of December, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 19, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which defendant-appellant will rely on appeal are:

1. The court erred in failing to enter judgment for defendant.

2. The court erred in finding that the assured, James Alexander Lyons, on or about the 10th day of February, 1953, died from bodily injuries which resulted directly and independently of all other causes and were effected solely through accidental means.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from bodily infirmity or from disease, and that his death was not caused directly or indirectly or wholly or partly by bodily or mental infirmity or by disease.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for plaintiff.

6. The court erred in entering a judgment in favor of plaintiff, Jane S. Lyons.

7. The court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's James Alexander Lyons, death.

8. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, directly and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

Dated this 8th day of January, 1957.

/s/ R. E. KRIESIEN,

Attorney for Defendant-Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

No. 7381

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Order of consolidation; Pre-trial order; Proposed findings of fact and conclusions of law; Proposed supplemental findings of fact; Judgment order; Notice of appeal; Undertaking for costs on appeal and supersedeas bond; Statement of points on appeal; Designation of contents of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7381, in which Glens Falls Indemnity Co., a New York Corporation is the appellant and defendant and Jane S. Lyons is the appellee and plaintiff; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that exhibits numbered from 1 to 44, inclusive, together with the transcript of testimony in this cause and Civil 7256, Jane S. Lyons, plaintiff vs. Underwriters at Lloyd's, Lon-

don, England, defendant have been forwarded by Railway Express by the attorneys for the appellant. The deposition of Homer P. Rush, M. D. is being forwarded with the transcript on appeal in Civil 7256.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 14th day of January, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15413. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Co., a Corporation, Appellant, vs. Jane S. Lyons, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: January 15, 1957.

Docketed: January 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15413

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Appellant,

vs.

JANE S. LYONS,

Appellee.

MOTION FOR CONSOLIDATION

Come now appellant and appellee by and through their respective counsel and move this court for an order consolidating the within case with that of Jane S. Lyons vs. Underwriters at Lloyd's, London, England, Civil No. 7256, for printing and oral argument purposes.

In support of said motion attached hereto is affidavit of R. E. Kriesien, of counsel for appellant.

Dated this 8th day of January, 1957.

MAGUIRE, SHIELDS, MORRI-
SON & BAILEY,

By /s/ HOWARD K. BEEBE,

Of Attorneys for Appellee.

MEINDL, MIZE & KRIESIEN,

By /s/ R. E. KRIESIEN,

Of Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
United States Circuit Judges.

[Title of Court of Appeals and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, R. E. Kriesien, being first duly sworn according to law, do depose and say:

That I am one of the attorneys for appellant in the within action and that the within action was consolidated with the case of Jane S. Lyons vs. Underwriters at Lloyd's, London, England, Civil No. 7256, for trial in the United States District Court for the District of Oregon, by court order; that the issues of fact and law involved in the appeal are identical in each case.

Dated this 7th day of January, 1957.

/s/ R. E. KRIESIEN.

Subscribed and sworn to before me this 7th day of January, 1956.

[Seal] /s/ LEONA F. OSTROSKI,
Notary Public for Oregon.

My Commission expires: 7/11/59.

[Endorsed]: Filed January 18, 1957.